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IN THE

Supreme Court of the United States

October Term, 1944.

No. 589.

COMMISSIONER OF INTERNAL REVENUE.

Petitioner.

v.

WILLIAM D. DISSTON.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.

DAVID A. KERR,
HAROLD EVANS,

Counsel for Respondent.

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OPINIONS BELOW.

The memorandum opinion of the Tax Court (R. 60-63) has not been reported. The opinion of the Circuit Court of Appeals (R. 72-79) is reported in 144 F. (2d) 115 (C. C. A. 3d, 1944).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 12, 1944 (R. 79). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED.

Whether gifts in trust for minors can be gifts of present interests, the first \$5,000 of which are excluded for gift tax purposes under Section 504 (b) of the Revenue Act of 1932.

ARGUMENT.

There are no special or important reasons for granting the certiorari. The amounts involved are small (totalling less than \$2,100 of taxes). There is actually no such conflict among the Circuits as petitioner suggests, because in the last analysis each decision depends on the exact terms of a deed of trust which is unlike that in every other decision. The apparent conflict in language in some of the decisions must be limited by what was in fact decided in each case. The trust in this case is not a trust to accumulate the income as petitioner asserts. Nor will the decision in this case in any way interfere with the administration of the tax laws.

1. An examination of the Disston deeds of trust establishes that the trustees were legally obligated to support, maintain and educate the minor beneficiaries. The direction to accumulate any income not needed for support, maintenance and education is without significance, because it merely incorporates into the deed of trust the duty imposed by law upon *all* who are entrusted with property belonging to a minor:

"The provision for the accumulation of income affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard." (Instant case at R. 76.)

The distinction between the instant case and the decisions cited by petitioner as in conflict with the instant case is the distinction between (1) an absolute duty to support, educate and maintain the minor beneficiary, and (2) a duty to support, educate and maintain *only if* the trustee in his uncontrolled discretion wants to support, educate and maintain the minor beneficiary.

In *Welch et al. v. Paine*, 120 F. (2d) 141 (C. C. A. 1st, 1941), the income of the trust for minors was to be accu-

mulated but the trustee was *empowered*, not directed, to advance to the beneficiaries or for their benefits such sums out of their respective shares as he might in *his absolute discretion* deem necessary, or advisable for their support, education and maintenance.

In each trust instrument considered in *Welch v. Paine*, 130 F. (2d) 990 (C. C. A. 1st, 1942), it was provided that the trustee "*in his discretion . . . may accumulate or withhold and make payments or distributions of shares and income to or for the education or support of any of your children as the trustees may deem best . . .*" (p. 990, italics added).


The duty imposed on the trustee with respect to the shares of minor beneficiaries in the case of *Fondren v. Commissioner*, 141 F. (2d) 419 (C. C. A. 5th, 1944), is also a discretionary duty. This is so even though one or two directions if read independently of the balance of the deed of trust would create an absolute duty.

Each of the deeds of trust involved in *French v. Commissioner*, 138 F. (2d) 254 (C. C. A. 8th, 1943), provided in substance that ". . . so long as a child of mine, who is under legal disability, is an income beneficiary hereunder, the trustee may *in its discretion* disburse or accumulate all or any part of the net income . . ." (italics added).

In *Commissioner v. Gardner*, 127 F. (2d) 929 (C. C. A. 7th, 1942), the trust indenture provided in part that ". . . the trustee shall use and apply such portions of the net income of the respective shares of the grantor's said grandchildren in and to the trust estate *as the trustee may deem necessary and proper* for their education, maintenance and support . . ." (pp. 929-930, italics added).

Each of the cases cited by Commissioner was very close, and in each the gift was held to be a gift of a future interest. Whether the accumulation of income during minority coupled with discretion in the trustee to spend the same for the support, maintenance and education of the minor should change a gift which in all other respects is a gift

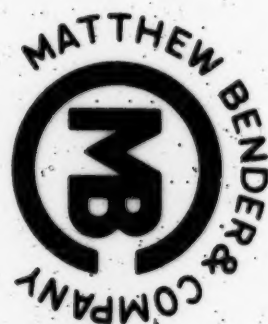
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3-6



Conclusion

of a present interest is open to serious question. However, when the gift is as complete a gift of a present interest as can be made to a minor, *by any means whatsoever*, there should be no doubt. Each of the gifts by respondent in the instant case is in all respects as complete a gift of a present interest as a minor is legally capable of receiving.

In *Wisotzkey v. Commissioner*, not officially reported but found in Volume 4, of Prentice-Hall Federal Tax Service, page 63120, the Circuit Court of Appeals for the Third Circuit said (page 63124):

"... There is an important factual difference between the *Disston* case and the instant case.

"By the terms of the trust indenture in the *Disston* case, authority was vested in the trustees to appropriate to the benefit of minor donees, from the accumulated income, amounts necessary to defray expenses for the education, comfort and support of the donees. . . . The accumulated income might be, if necessary, entirely exhausted."

2. The second reason advanced by the petitioner assumes that the trust in the instant case is a trust to accumulate income. This assumption is contrary to the actual facts.

3. Petitioner has failed to indicate how the decision below may give rise to serious problems in evaluating the interest of a beneficiary. Respondent believes that the recognition of the fact that the gifts to the minors in the instant case were gifts of present interests would eliminate altogether any question of evaluation of interest.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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HAROLD EVANS,

Counsel for Respondent.

